

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE AND SERVICE CHANGES TO IMPLEMENT
BASELINE NEGOTIATED SERVICE AGREEMENT
WITH BANK OF AMERICA CORPORATION

Docket No. MC2007-1

**RESPONSE OF UNITED STATES POSTAL SERVICE IN OPPOSITION TO
MOTION OF AMERICAN POSTAL WORKERS UNION, AFL-CIO, FOR
ISSUANCE OF A SUBPOENA TO COMPEL TESTIMONY AND THE
PRODUCTION OF DOCUMENTS BY BRENT A. RANEY
(May 10, 2007)**

On May 3, 2007, the American Postal Workers Union, AFL-CIO (APWU), moved for issuance of a subpoena compelling Brent A. Raney, Manager, Technology/Apps, Engineering, of the United States Postal Service to appear for a deposition conducted by APWU counsel before the commencement of hearings in this case.¹ The Postal Service hereby opposes that motion, and also requests that any subpoena issued in response thereto be quashed.

BACKGROUND

On April 25, 2007, APWU moved for issuance of a subpoena compelling Walter O'Tormey, Vice President, Engineering, of the United States Postal Service to appear for a deposition conducted by APWU counsel before the

¹ Motion of American Postal Workers Union, AFL-CIO for Issuance of A Subpoena to Compel Testimony and the Production of Documents by Brent Raney and to Withdraw Without Prejudice APWU's Motion for Issuance of A Subpoena to Walter O'Tormey, May 3, 2007. As indicated by the title of the pleading, APWU also withdrew its motion for a subpoena compelling Mr. O'Tormey to appear at a deposition.

commencement of hearings in this case.² Subsequently, the Postal Service offered to produce Mr. Raney for cross-examination during the Postal Service's direct case to address improvements in letter mail read/accept rates since 1999. On May 1, 2007, the Postal Service opposed APWU's motion for issuance of a subpoena on a variety of grounds and repeated its offer to make Mr. Raney available for cross-examination for hearings on its direct case.³ That same day, APWU filed a motion requesting that the May 8, 2007 hearing on the co-proponents case-in-chief be postponed for 30 days in order to allow adequate time to conduct follow-up discovery on interrogatories previously filed, to seek to depose Mr. Raney and, if necessary, to conduct discovery on Mr. O'Tormey.⁴ Neither the Postal Service nor Bank of America opposed the delay. On May 3, 2007, the same day that APWU filed the instant motion, the Presiding Officer issued a ruling, that among other things, rescheduled the hearing for June 14, 2007, allowed discovery directed to Mr. Raney through May 25, 2007 and denied, without prejudice, APWU's motion for issuance of a subpoena compelling Mr. O'Tormey to appear for a deposition.⁵

ARGUMENT

APWU's motion to compel Mr. Raney's deposition is inconsistent with P.O. Ruling No. MC2007-1/5. In that ruling, the Presiding Officer allowed written

² Motion of the American Postal Workers Union, AFL-CIO for Issuance of a Subpoena to Compel Testimony and the Production of Documents by Walter O'Tormey, April 25, 2007.

³ Response of United States Postal Service in Opposition to Motion of American Postal Workers Union, AFL-CIO, for the Issuance of a Subpoena to Compel Testimony and the Production of Documents by Walter O'Tormey, May 1, 2007.

⁴ Motion of the American Postal Workers Union, AFL-CIO to Reschedule Hearing on Co-proponents Case in Chief for June 7, 2007, May 1, 2007.

⁵ Presiding Officer's Ruling Rescheduling Hearing, Presiding Officer's Ruling No. MC2007-1/5, May 3, 2007 ("P.O. Ruling No. MC2007-1/5").

discovery to be directed to Mr. Raney, including any institutional discovery directed to Mr. Raney, through May 25, 2007 and directed that, as offered by the Postal Service, Mr. Raney be made available for cross-examination during the rescheduled hearing.

The ruling also denied without prejudice APWU's motion for leave to depose Mr. O'Tormey. The Presiding Officer noted that Commission rules allow depositions only under limited circumstances, including unavailability of the witness at hearing, the necessity of perpetuating the witness' testimony, and prevention of undue and excessive expense and undue delay or undue burden. The Presiding Officer stated that since Mr. Raney would be available during the hearing and since a period of written discovery was being permitted, "[n]o undue burden or hardship is apparent."⁶ The Presiding Officer accordingly concluded that "a persuasive argument to allow a formal deposition has not been made."⁷

The logic of P.O. Ruling No. MC2007-1/5 applies with equal force to APWU's request to depose Mr. Raney. As the ruling noted, depositions are an extraordinary remedy in rate and classification cases. The Commission's rules, referenced by the Presiding Officer, provide for the taking of depositions only when: (a) "the person whose deposition to be taken would be unavailable at the hearing"; (b) "the deposition is deemed necessary to perpetuate the testimony of the witness"; or (c) "the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants." Rule 33(a), 39 C.F.R. § 3001.33(a). Mr.

⁶ *Id.* at 3.

⁷ *Id.*

Raney will be available for cross-examination during the hearing. Thus, the first two criteria are not satisfied. Further, as indicated in P.O. Ruling No. MC2007-1/5, Mr. Raney's availability during the hearing, coupled with the period of written discovery provided, clearly demonstrate that conducting a deposition would not prevent undue expense, delay or burden. In fact, to allow a deposition in addition to written discovery and appearance at a hearing, would increase the expense and burden on all participants and would hold at least the potential for further delay. Under the circumstances, APWU has offered no justification for being allowed a third bite at the apple.

Finally, APWU has failed to justify the issuance of any subpoena in this case. Prior to enactment of the Postal Accountability and Enhancement Act ("PAEA"), the Commission lacked subpoena authority in rate and classification proceedings. It is too early to determine that PAEA's enactment calls for a different outcome. Section 602 of PAEA (39 U.S.C. § 504(f)(2)), which establishes a process for the issuance of subpoenas, has not been implemented through a rulemaking. Section 602 provides, in pertinent part:

(2) The Chairman of the Commission . . . may . . .

(A) issue subpoenas requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession of, any covered person;

This section has yet to be implemented under the Commission's rulemaking authority. 39 U.S.C. § 503.

The Commission has not issued rules of practice relating to the use of subpoenas. It is unclear, therefore, whether a motion is required to issue a

subpoena, or whether one might be issued through some other mechanism, as is done in other venues. It also would be appropriate for the Postal Service and other interested parties to submit comments on any new rules issued under the statute regarding the definition of a “covered person.” In addition, the materials requested in the APWU subpoena contain, in large part, privileged information. The Commission’s rules protect the confidentiality of such information in discovery, but such rules have not been developed in the context of subpoena requests. Accordingly, since the Commission has not established rules relating to subpoenas, there is no established mechanism for Postal Service input in this instance.

CONCLUSION

For all of these reasons, the APWU's Motion for issuance of a subpoena should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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